No. 92-357

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RUTH O. SHAW, et al,
Appellants,

v.

WILLIAM BARR, ATTORNEY GENERAL, et al,
Appellees.

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

APPELLANTS' BRIEF IN RESPONSE TO MOTION OF THE FEDERAL APPELLEES TO AFFIRM

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Pursuant to this Court's Rules 18.8 and 21.4, the appellants respond to the Motion of the Federal Appellees to Affirm.

STATEMENT

In their complaint, as amended, appellants (who are five registered voters

of Durham County, North Carolina) sought relief both against the Federal appellees, Attorney General Barr and Assistant Attorney General Dunne, and against various North Carolina officials (J.S. App. 67a-99a). According to their allegations, the Federal appellees initiated an unconstitutional sequence of events which resulted directly in the loss of various rights guaranteed to appellants as registered voters by Article I, Sections 2 and 4; Article IV, Section 2, clause 1; and the Fifth, Fourteenth, and Fifteenth Amendments of the United States Constitution. (Ibid.)

In seeking to uphold the three-judge district court's dismissal of the action as to them, the Federal appellees now have filed a Motion to Affirm which relies on a claimed "lack of jurisdiction pursuant to

Section 14(b) of the Voting Rights Act of 1965, 42 U.S.C. 1973l(b)", and on "the Attorney General's "exercise of his unreviewable enforcement discretion under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c." (Motion to Affirm at p. i)

ARGUMENT

If appellants were seeking to regulate the exercise of Attorney General Barr's discretion under Section 5 of the Voting Rights Act of 1965, the contention of the Federal appellees might have merit. However, these appellees have mistaken the thrust of appellants' claims.

Appellants have sued because their precious constitutional rights as registered voters have been violated by both the Federal appellees and the State appellees. Perhaps, as the Federal

appellees contend, "the Attorney General's decisions under Section 5 are insulated from all judicial review, even if he exercises his statutory discretion in a lawless or arbitrary fashion." (Motion to Affirm at p. 12). However, Congress never intended to "insulate" the Attorney General from judicial review of the constitutional claims of registered voters that he has acted in a racially discriminatory manner and with an invidious discriminatory intent in violation of the Fifth and Fifteenth Amendments.

"We begin with the strong presumption that Congress intends judicial review of administrative action." Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986). This presumption is even stronger when a claim is made that the administrative action violates

constitutional rights.

Thus, in Webster v. Doe, 486 U.S. 592, 603 (1988), this Court recently ruled that, although 5 U.S.C. 701(a)(2) and 50 U.S.C. 403(c) precluded judicial review of employment termination decisions made by the Director of the Central Intelligence Agency, these statutory provisions did not "exclude review of constitutional claims." As Chief Justice Rehnquist explained:

> Petitioner maintains that, no matter what the nature of respondent's constitutional claims, judicial review is precluded by the language and intent of § 102(c). In petitioner's view, all Agency employment termination decisions, even those based on policies normally repugnant to the Constitution are given over to the absolute discretion of the Director, and are hence unreviewable under the APA. We do not think § 102(c) may be read to exclude review of constitutional claims. We emphasized in Johnson v. Robison, 415 U.S. 361 (1974), that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be

> clear. Id. at 373-374. In Weinberger v. Salfi, 422 U.S. 749 (1975), we affirmed that view. We require this heightened showing in part to avoid the "serious constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim. See Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681, n. 12(1986).

Id. at 486 U.S. 603 (1988)

If Section 5 of the Voting Rights Act is given the meaning on which the Federal appellees insist, the "serious constitutional question" to which the Chief Justice refers comes to the forefront. Appellants will have no accessible judicial forum for their constitutional claims against federal officials.

According to the Motion to Affirm, "appellants' claims against the federal defendants can be brought, if at all, only in the United States District Court for

the District of Columbia." (at page 9). (Emphasis supplied). With respect to the emphasized language, we call to the Court's attention that, from the outset of this litigation, the Federal appellees have forthrightly acknowledged doubt that appellants could sue in the District Court for the District of Columbia. Indeed, the language of the Voting Rights Act seems to contemplate that any action in the District of Columbia can only be filed by a State or a subdivision thereof. Cf. 42 U.S.C. 1973c. Thus, if the Federal appellees are correct, the appellants would be denied "any judicial forum for [their] colorable constitutional claim." See Webster, supra at 603 and Bowen, supra at 681, n. 12. (Emphasis added)

The Federal appellees claim that as to them Section 14(b) of the Voting Rights

Act of 1965, 42 U.S.C. 1973l(b), deprived the three-judge district court of jurisdiction to consider appellants' constitutional claims. However, the statutory language does not require this result. Its limitation on "jurisdiction to issue any declaratory judgment pursuant to section 1973b or 1973c" has no relevance to the judicial declaration requested by appellants that the federal appellees have unconstitutionally required the North Carolina Legislature to create two majority-minority districts. Likewise, the restriction on jurisdiction to issue "any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of subchapter I-A to I-C of this chapter or any action of any federal officer or employee pursuant hereto" does not seem

intended to prevent registered voters from joining the Attorney General as a party defendant in an action they bring to contest the constitutionality of a congressional redistricting plan that has already been enacted by the state legislature and precleared by the Attorney General.

In Morris v. Gressette, 432 U.S. 491, 501-504 (1977), the Court suggested that Congress did not wish to permit the delays that might ensue if judicial review were allowed of the Attorney General's decisions whether to preclear or object to a redistricting plan. However, the problem of delay is not present when, as here, the Attorney General has already exercised his discretion not to object to a redistricting plan and that plan now is being challenged on constitutional grounds

by the registered voters whom it has injured.

In Morris the Court commented (at 506-7):

> "Where the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation. But it cannot be questioned in a suit seeking review of the Attorney General's exercise of discretion under § 5, or his failure to object within the statutory period. (Emphasis supplied)

Appellants' suit in a three-judge district court in North Carolina does not seek review of the Attorney General's exercise of discretion under Section 5 or his failure to object to the plan created at his behest. Instead, it is "traditional constitutional litigation"; and nothing in Morris - or in 1973l(b) - states specifically that the Attorney General may not be made a defendant in such litigation.

Furthermore, the appellants' attack goes beyond the issue of how Section 5 of the Voting Rights Act should be interpreted by the Federal appellees. Indeed, the five appellants are all residents of a county which is not even subject to Section 5 of the Voting Rights Act; and they submit that -- at least as to them and other registered voters in the counties not covered by Section 5 -- unconstitutional action taken by the Attorney General in applying that Section was not intended by Congress to be "insulated" from constitutional attack.

The Federal appellees also contend that they are not indispensable parties in this litigation and that "if appellants were to succeed in their challenge to the State's plan, the absence of the Attorney General as a party would not prevent

issuance of meaningful relief." (Motion to Affirm at 12-13). The alternatives they propose are disheartening.

One is a "judicially drawn re-districting plan", whereby the task of Congressional redistricting is removed from the elected State legislators and turned over to federal judges. Under this scenario, the result of the Attorney General's dogmatic and unconstitutional insistence on the creation of two majority-minority districts in North Carolina would ultimately be the injection of the Federal Courts even more directly into the politically sensitive process of Congressional redistricting - at the expense of State responsibility and control. This clearly was not intended by Congress.

The second alternative is submission

of "a newly revised state plan ... for administrative or judicial preclearance" pursuant to 42 U.S.C. 1973c. However, if the Attorney General is dismissed as a party to this suit, he will be free in the future to apply the same unconstiutional requirement of two majority-minority districts in North Carolina and a stalemate will result. If judicial preclearance is sought in the District Court of the District of Columbia -- whether initially or to break a stalemate after the Attorney General has rejected a revised plan -- the appellants have no standing to participate in those judicial proceedings. In sum, the alternatives suggested by the Federal appellees are circuitous, cumbersome, and ineffective; they provide no meaningful remedy to appellants for the violation of their

constitutional rights as registered voters.

In United Jewish Organizations v. Carey, 430 U.S. 144, 154 n.13 (1977) (hereinafter "U.J.O."), the Attorney General had been sued "because he allegedly caused State officials to deprive petitioners of their constitutional rights." Similarly, in the present case the appellants have sued the Attorney General because they claim that he caused the North Carolina Legislature to enact a congressional redistricting plan which violated their constitutional rights and became the nation's prime example of "political pornography".

In U.J.O., the Attorney General was subsequently dismissed as a party defendant; and, because the dismissal was not raised on appeal to this Court, the

issue was left open. 430 U.S. at 154, n.13. Now the issue is before this Court for decision. Appellants submit that -- in light of the presumption of reviewability of administrative action, the presence of colorable constitutional claims, and the absence of statutory language demonstrating an unequivocal congressional intention to preclude review of those claims -- the decision now should be to uphold jurisdiction over the Federal appellees. Cf. Webster v. Doe, supra. The "insulation" from suit which they claim under 42 U.S.C. 1973l(6) was never meant by Congress to extend to this type of suit.

CONCLUSION

The questions posed by Appellants are substantial with respect to both the Federal and State Appellees. Instead of

summarily affirming the decision below, the Court should note probable jurisdiction, receive briefs, hear oral argument, and give plenary consideration to the vital constitutional issues which appellants have raised.

Respectfully submitted this the 9th day of November, 1992.

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